

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ANTHONY B. WADE,

Defendant-Appellee.

UNPUBLISHED

January 26, 2001

No. 223351

Wayne Circuit Court

LC No. 99-005308

Before: Doctoroff, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant was charged with carrying a concealed weapon, MCL 750.227; MSA 28.424. The circuit court granted defendant's motion to suppress and dismissed the case, finding that the police lacked reasonable suspicion to justify a search of defendant. The prosecution appeals as of right. We reverse.

On May 13, 1999, at approximately 1:00 a.m., two police officers were on duty in the City of Detroit when they received a radio call stating that shots were fired in the area of Bradford, Six Mile, Khalil and Clough. According to the dispatch, two black males sitting in a white Oldsmobile were being fired upon. The officers arrived at the area in approximately five or ten minutes, and observed two black males in a white Cadillac backed into a driveway on Bradford. The officers stopped to investigate because the car was the only vehicle in the area that appeared to fit the description in the radio call.

Defendant was sitting on the driver's side of the vehicle. Before the officers reached the vehicle, the person on the passenger's side got out, told the officers that "there was no problem, there was nothin going on," and started to walk away. As one of the officers stood close to the driver's side of the vehicle, he noticed that defendant was fidgeting on the right side of his body and breathing heavy.

The officers asked defendant to get out of the vehicle and performed a *Terry*¹ search on the defendant and the passenger. While conducting a pat down of defendant, one of the officers

¹ *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

(continued...)

lifted defendant's outer garment and removed a gun from defendant's waist band. Defendant was arrested for carrying a concealed weapon.

On appeal, the prosecution argues that the trial court erred when it granted defendant's motion to suppress. We review the factual findings of a trial court in a suppression hearing for clear error, and affirm unless this Court has a definite and firm conviction that a mistake has been made. *People v Custer*, 242 Mich App 59, 64; 618 NW2d 75 (2000). To the extent that the trial court's decision is based on an interpretation of the law, our review is de novo. *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999).

The prosecution claims that the police officers had reasonable suspicion to conduct a search of defendant because the officers were responding to a radio call of shots being fired and defendant matched the description provided by the dispatch. Generally, the Fourth Amendment requires police to obtain a warrant before conducting a search. *People v Levine*, 461 Mich 172, 178-179; 600 NW2d 622 (1999). However, an exception to the warrant requirement applies to brief investigative stops short of arrest, where the police officers have a reasonable suspicion of ongoing criminal activity. *Terry v Ohio*, 392 US 1, 21; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Christie (On Remand)*, 206 Mich App 304, 308; 520 NW2d 647 (1994).

Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause. *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). In determining whether the police officer's suspicion was reasonable, this Court should give deference to the police officer's experience and knowledge of patterns of criminal behavior. *People v Nelson*, 443 Mich 626, 635-636; 505 NW2d 266 (1993). Whether police conduct constitutes an unreasonable search or seizure should be evaluated in light of the totality of the circumstances with which the police were confronted. *People v LoCicero*, 453 Mich 496, 501-502; 556 NW2d 498 (1996); *People v Armendarez*, 188 Mich App 61, 66-67; 468 NW2d 893 (1991).

The facts of the present case are very similar to the situation this Court addressed in *People v Muro*, 197 Mich App 745; 496 NW2d 401 (1993). In *Muro*, the defendant was a passenger in a truck that was stopped because of a cracked windshield. During the stop, the police officer noticed that the defendant and the driver of the truck appeared to be very nervous and fidgety. The officer also discovered that the driver had a suspended license and an outstanding warrant for his arrest. The driver was arrested and a pat down search for weapons was conducted on the defendant. During the search the defendant reached into his pants and pulled out four bags of marijuana.

In reversing the trial court's decision to suppress this evidence, this Court concluded that the officer had a reasonable suspicion that criminal activity had occurred and reasonable fear for his own safety because of the nervous gestures, the suspicious movements, the driver's suspended license, and the outstanding warrant. *Id.* at 747-748. Because the officer had reasonable suspicion, the officer's pat down search of the defendant was justified. *Id.* at 748.

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Another case which is analogous to the instant case is *United States v Erwin*, 155 F3d 818, (CA 6, 1998). In *Erwin*, the defendant was stopped by police officers because he matched a description broadcast on police radio of a drunk or reckless driver. The officers noticed that the defendant (1) was nervous, (2) tried to avoid being questioned, (3) used a pay phone when he had a cellular phone in his car, (4) had suspected drug paraphernalia in his vehicle, (5) had a large sum of money in his pockets, (6) did not have a vehicle registration, (7) had a criminal record, and (8) had an out-of-place back seat cushion. However, he showed no signs of intoxication.

The court held that the police officers were justified in searching the defendant since they had reasonable, articulable suspicion that the defendant was engaged in criminal activity. *Id.* at 822. Further, although the officers were satisfied that the defendant was not drunk and many of the facts were consistent with innocence, the officers' suspicion was reasonable and articulable in light of the totality of the circumstances. *Id.*

Applying the holdings of *Muro* and *Erwin* to this case, we conclude that the police had reasonable and articulable suspicion sufficient to warrant the search. The officers were investigating a police radio call warning that shots were fired on two black males in a white vehicle. In addition to the fact that defendant appeared to match the description provided in the call, the officers observed that (1) defendant's vehicle was the only white car with two black males inside in the area, (2) the passenger told the officers that nothing was going on and started walking away, and (3) defendant was fidgeting on the right side of his body, breathing heavy, and appeared more than a little nervous. Under the totality of the circumstances, the officers reasonably feared for their safety and suspected that defendant was engaged in criminal conduct. The trial court's decision to suppress the evidence and dismiss the case was clearly erroneous.

Reversed.

/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter